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No. 80-5950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAVERNE L. LOGAN, *Appellant,*

v.

ZIMMERMAN BRUSH COMPANY, *Appellee.*

On Appeal From The Illinois Supreme Court

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Does it violate due process to terminate an employment discrimination charge without notice and a decision based upon either the strength of the charge or the diligence of the charging party, when the sole basis for the termination is that an administrative investigator negligently failed to convene a fact finding conference within the statutory period?

2. Does it violate the equal protection rationality standard to terminate those charges of employment discrimination in which an administrative investigator, prior to any evaluation of the merits of the charge, fails to convene a timely fact finding conference, when other charges receive a decision on the merits and judicial review?

LIST OF PARTIES

Laverne L. Logan, Appellant.

Zimmerman Brush Company, Appellee.

The Illinois Human Rights Commission, as successor to the Illinois Fair Employment Practices Commission, Appellee.

Delores Neighbors, Investigator of said Commission, Appellee.

Connie Villaba, Unit Coordinator of said Commission, Appellee.

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BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 82 Ill.2d 99, 411 N.E.2d 277 (1980) (J.A. 28-36).

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's ac-

tion before the Illinois Fair Employment Practices Commission was entered on September 29, 1980 (J.A. 28).

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on December 22, 1980. The appeal was docketed December 27, 1980. The United States Supreme Court noted probable jurisdiction on February 23, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §19, of the Illinois Constitution provides in pertinent part:

> All persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

The Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 *et seq.* (1979) (repealed by and reenacted as the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, §1-101 *et seq.*, effective July 1, 1980), is set out in the Joint Appendix (J.A. 37-55).

Pertinent Sections of the Rules and Regulations of the Fair Employment Practices Commission are set out in the Appendix to this Brief at 57.

STATEMENT OF THE CASE

On September 29, 1980, the Illinois Supreme Court granted appellee Zimmerman Brush Co. ("the Company") a writ of prohibition barring the Illinois Fair Employment Practices Commission ("the Commission") from ever reaching a decision on the merits of appellant Laverne Logan's charge of employment discrimination under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, §851 *et seq.* (1979), (J.A. 37-55), ("the FEPA"). Although Mr. Logan had complied with all procedural requirements in a timely fashion, his claim was terminated because the Commission had failed to perform its statutory duty of convening a fact finding conference within 120 days of the filing of the charge.

Mr. Logan filed his charge *pro se* with the Commission on November 14, 1979 alleging that the Company had discriminated against him because of his physical handicap, a short left leg. Section 853(a) of the FEPA provides that it is an unfair employment practice to discriminate in the conditions of employment against an individual because of a physical handicap unrelated to ability.

Section 858(a) of the FEPA requires that a person alleging an unfair employment practice file a charge with the Commission within 180 days of the date of the occurrence of the alleged unfair practice (J.A. 45). It is then the Commission's responsibility to undertake an investigation to ascertain the facts relating to the alleged unfair employment practice. If the Commission finds "substantial evidence" supporting the charge, it issues a complaint. Ill. Rev. Stat. ch- 48, §858(c) (1979) (J.A. 45-47). If the Commission does not find substantial evidence, a Notice of Dismissal is sent to the complainant. The complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within 30 days of the date of Notice. Fair Employment Practices Commission, Rules and Regulations, §§4.5, 4.7, 5.7 (1979), Appendix to this Brief at 57. If the full Commission finds "no substantial evidence" and dismisses the charge, the victim of

the discrimination can seek judicial review of the Commission's action. Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53). The Commission has 300 days from the date the charge was filed to complete its investigation and either dismiss the charge or issue a complaint. Ill. Rev. Stat. ch. 48, §858(8)(d)(1979) (J.A. 50-51).

The FEPA directs the Commission to convene a fact finding conference within 120 days of the date the charge was filed. The purposes of this conference are: "obtaining evidence, identifying issues in dispute, ascertaining the positions of the parties, and exploring the possibility of a negotiated settlement of the controversy." Ill. Rev. Stat. ch. 48, §858(b) (1979) (J.A. 45).

In this case, Mr. Logan complied with the 180 day limit for filing charges. He filed his charge *pro se* only five days after the Company terminated his employment. It then was the Commission's responsibility to convene a fact finding conference within 120 days (by March 13, 1980). On January 28, 1980 (45 days before the end of the 120 day period) the Commission notified the parties that they would be required to attend a fact finding conference on March 18, 1980. The investigator had negligently misread her calendar and had scheduled the conference for five days after the expiration of the 120 day period. The "Notice of Fact Finding Conference" announced the date, time and place of the conference and also indicated that attendance is mandatory. However, no notice was included that the conference must be held within 120 days from the filing of the charge (J.A. 5-6).

On January 28, 1980, the Commission also sent a questionnaire to the Company and directed that the Company submit answers by March 10, 1980. On March 7, 1980, the Company submitted answers to the Commission's questionnaire. The Company did not object at this time to the March 18 date for the fact finding conference.

On March 18, 1980, at the beginning of the fact finding conference, the Company's attorney presented the Commis-

sion's investigator with a written motion asserting that because the conference had not been convened within 120 days of filing, the charge should be dismissed. The investigator's supervisor denied the motion. The Company's attorney refused to participate in the fact finding conference and walked out. Mr. Logan appeared *pro se* at the conference.

Two days later, the Company filed a motion for leave to file its petition for an original writ of prohibition in the Illinois Supreme Court (J.A. 17). Leave was granted on March 25, 1980. The court also stayed proceedings on Mr. Logan's charge pending disposition of the petition for a writ of prohibition.

Mr. Logan sought legal assistance from the Edwin F. Mandel Legal Aid Clinic of the University of Chicago on April 23, 1980. Because 180 days had not passed since the act of discrimination, Mr. Logan filed a new charge raising the same claim.

Mr. Logan responded to the Company's petition for a writ of prohibition by filing with the Illinois Supreme Court a motion to dismiss or, in the alternative, to stay proceedings on the Company's petition. He argued, *inter alia,* that to terminate his claim simply because the Commission had failed to convene a fact finding conference within 120 days would violate his constitutional rights under the Fourteenth Amendment to due process and equal protection. Mr. Logan also argued that the Company had waived its objection to the late scheduling of the fact finding conference and should be estopped from raising the issue at the conference. The Company had received notice of the conference 45 days prior to the date it was held and participated in the pre-conference procedures by answering a questionnaire sent to it by the Commission (J.A. 9-11). He also argued that because he had filed a second identical charge within the 180 day period, the Company's petition should be denied on the grounds that it had become moot. The Fair Employment Practices Commission, arguing against termination of Mr. Logan's charge, contended that

the words of the statute were discretionary and did not mandate the dismissal of the charge.

The Illinois Supreme Court awarded the Company a writ of prohibition on September 29, 1980. The court disagreed with the Commission's contention that the 120-day period was merely a discretionary time period. The court held, instead, that the time limit was mandatory. Although the 120-day limit had never before been construed by the court to be mandatory, the court held that the employee's charges should be terminated (J.A. 28-36).

The court also held that the Company had not waived its right to object to the late scheduling of the fact finding conference. According to the court, the Company had responded to the Commission's questionnaire only because it would have been held responsible for failing to do so. The court also noted that "it is not shown . . . that the 120-day period . . . would expire before the scheduled date of the conference." (J.A. 34).

The Court then disposed of Mr. Logan's constitutional arguments by stating that:

> We also are not persuaded by the employee's protests that his rights to due process and equal protection were violated. The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices. The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights.

(J.A. 34-35). The court then ruled against Mr. Logan's contention that the question regarding the fact finding conference was made moot because he had filed a second charge with the Commission within the required 180-day period. (J.A. 35). Mr. Logan had claimed that his second charge should be governed by the Human Rights Act, which had become effective on July 1, 1980 (Ill. Rev. Stat., 1979 Supp., ch. 68, ¶ 1-101 *et seq.*) and which made the convening of a fact finding conference discretionary. The court held that even if the

amended act made a fact finding conference discretionary, the amended statute did not apply. "A statute will be given prospective application unless there is a clear expression of legislative intent that it is to be retroactively applied." (J.A. 35).

Finally, the court concluded that to allow Mr. Logan to file a second charge "would frustrate the design of [the FEPA] and, in a case such as this one, would allow the Commission, despite its failure to comply within the Act, to proceed on an identical charge after the first charge had already expired or suffered dismissal." (J.A. 36).

SUMMARY OF ARGUMENT

I. Mr. Logan lost his case solely because the investigator negligently scheduled the fact finding conference beyond the 120 day limit set in the FEPA. He lost even though it was the responsibility of the Commission to schedule the fact finding conference within the proper time. The Illinois Supreme Court violated due process by ordering that his case be dismissed without any decision being made by the Commission or the Court based on the merits of the case or on the conduct of the parties. The Illinois Supreme Court was also wrong because no notice was given by the Commission of the impending termination of Mr. Logan's case and what procedures he could use to correct the mistake. This Court should reverse and rule that Mr. Logan's procedural rights have been violated.

A. This case falls within the very heart of procedural due process procedures which have been identified in this Court's decisions. The State must provide notice of an impending termination of those rights which qualify for protection as "property" under the Fourteenth Amendment. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). The State must also provide notice of the procedures available to complain about the termination of rights at least before the termination becomes final. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). In any event, the absolute minimum procedural re-

quirement is that the State must make a conscious and deliberate decision to terminate the rights. *Bell* v. *Burson*, 402 U.S. 535 (1971).

No notice was given to Mr. Logan that failure to convene the fact finding conference within 120 days from the date the charge was filed would result in his case being dismissed and his rights under the FEPA being terminated. The Notice of Fact Finding Conference sent to Mr. Logan did not comply with the notice required by Due Process. It only advised him that he must attend the schedule fact finding conference in person. It never advised him that the conference must be scheduled within the 120 day time period. Nor did the statute mention that termination might result from the failure to schedule a fact finding conference within the 120 day period. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), should be directly applied to this case and its requirements made applicable to the FEPA. *Memphis Light* required prior notice of the impending termination of utility services and the establishment of administrative procedures to complain about the proposed termination and notice of how to use the procedures to make a complaint. As in *Memphis Light*, the nature of the parties, the controversy and the procedural setting demonstrate that these requirements are necessary to assure that laymen are fairly treated.

Application of the three-part test in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), also establishes that prior notice of the termination and the procedures to complain are required by due process: (1) Mr. Logan's interest in proceeding with his case under the Fair Employment Practices Act was important; (2) there was a very high risk of an erroneous deprivation of Mr. Logan's rights because he was never given the opportunity to prove that the Company had discriminated against him, and the risk could have been avoided by notifying him of the 120 day requirement and his rights to ask to have the fact finding conference rescheduled; and (3) the additional procedural safeguards of notice and a chance to complain would have imposed upon the state or the public interest no significant additional costs or burdens.

Mr. Logan's due process rights were also violated because the Commission permanently terminated his claims without regard to its merits or diligence of either adverse party. When the State sets up an adjudicatory system to decide which of two private parties should prevail, a decision is the bare essential to which the parties are entitled. The FEPA created an entitlement for Mr. Logan to present his version of the facts and his arguments about why he should prevail. Having created this substantive entitlement, the State cannot condition it on procedural requirements which eviscerate the entitlement itself. The determination of liability between the parties cannot turn on the fortuity of the investigator's negligence. Rather, it must be related to which party should prevail in the action. To do otherwise would give the Company a defense which is "wholly arbitrary or irrational" in violation of due process. *Martinez* v. *California*, 444 U.S. 277 (1980).

B. Mr. Logan has a property interest protected by due process in the right to use the adjudicatory system established by the FEPA to seek recovery for the discrimination he suffered in his employment. This Court has looked to state law to determine whether an interest is "property" within the meaning of the Due Process Clause. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). *See also Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sindermann*, 408 U.S. 593 (1972). If the interest at stake has been granted to an individual by the state, a "for cause" requirement is a critical indicium of whether that interest is property protected by due process. *See Memphis Light; Barry* v. *Barchi*, 443 U.S. 55 (1979); *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Mr. Logan's right to adjudicate his claim of employment discrimination is a protected property interest because the provisions of the FEPA, when read together, demonstrate that once this right has been granted to any individual, it cannot be extinguished except on a showing of cause. The FEPA requires the Commission to determine during its investigation whether there is substantial evidence supporting an in-

dividual's charge; after an evidentiary hearing, the Commission decides whether an unfair employment practice has occurred. Under the FEPA, a charge may be dismissed only if it is found to be unmeritorious or if either party defaults. Thus, due process attaches to Mr. Logan's right to use the FEPA's adjudicatory system because that right may be revoked only "for cause."

This Court also looks to the importance of interests underlying an entitlement to determine whether constitutional protection is due. Mr. Logan has interests in his employment and in freedom from discrimination; he has interests in the backpay and other relief he would be awarded should he prevail; he has interests in public vindication of his ability to do his job, regardless of his handicap. These interests are no less important than those that were considered in granting due process protection in *Bell, Goldberg,* and *Goss.*

Further, recognition that Mr. Logan's right to utilize the FEPA's adjudicatory system is a protected property interest does not also require recognition that all causes of action are protected interests. In Mr. Logan's case, due process attaches because he had already been granted access to the Commission's adjudicatory system by filing his charge. Unlike *United States* v. *Kras*, 409 U.S. 434 (1973), this case does not involve denial of access to a judicial forum; rather, it involves the revocation of an important interest which the state had already granted to Mr. Logan.

C. Mr. Logan has a liberty interest protected by the Fourteenth Amendment. This protected interest consisted of a cumulation of interests taken from him as a result of the Fair Employment Practices Commission's termination of his charge of discrimination. Some of these interests, if considered alone, might be insufficient to constitute a protected interest. Under recent rulings of this Court, however, the cumulation of these interests may result in the creation of a liberty interest. *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (defamation must be combined with an additional "tangible interest" such as employment to be protected); *Owen* v. *City*

of Independence, 100 S.Ct. 1398, 1407 (1980) (the "impugning [of the] petitioner's honesty and integrity," combined with termination of his employment, constituted a protected liberty interest).

Mr. Logan was deprived of (1) the right to have the Fair Employment Practices Commission adjudicate his claim for reinstatement; (2) the right to have the Commission determine whether he was entitled to back pay, attorney's fees and other money damages; (3) the entitlement created by the state not to be discriminated against by his employer; (4) the right to have the Commission determine whether to clear his record for purposes of pursuing future employment; (5) the right to have the Commission vindicate him before his co-workers, peers and the community, and to restore his dignity and self-esteem by determining whether the company discriminated against and wrongly fired him; (6) the right granted by statute to have administrative review by the Circuit Court to correct the misimpression among his co-workers, peers and the community that, by terminating his charge, the Commission had concluded that he had been properly fired for non-discriminatory reasons; and (7) the right to receive the valuable benefit of an investigation and hearing provided by the Commission.

These interests, taken together, constitute a liberty interest protected by the due process clause of the Fourteenth Amendment.

II. Termination of Mr. Logan's employment discrimination claim solely because the investigator failed to convene a timely fact finding conference violates Mr. Logan's right to equal protection of the laws. As interpreted by the Illinois Supreme Court, the statute providing that fact finding conferences are to be held within 120 days requires the blanket elimination of all cases in which the investigator misses the deadline. Two classes of claimants are thus created: those who may exercise the statutory right to pursue their claims under the FEPA and those whose claims are extinguished.

This classification rests on grounds wholly irrelevant to the achievement of the FEPA's two express objectives: protecting employees from discriminatory treatment and protecting employers from unfounded charges. Only a classification that takes into account the merits of charges can rationally promote these objectives. The instant classification is applied before the merits of the charges have even been examined. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), this Court held that a double bond requirement for forcible entry and detainer appeals was not rationally related to the objective of discouraging unfounded appeals. Like the classification in *Lindsey*, the classification in the instant case does not act to screen out unfounded claims. Instead, it arbitrarily terminates meritorious charges, while giving unfounded claims a hearing and decision.

The classification in the instant case also fails to promote the secondary purpose identified by the Illinois Supreme Court: the "just and expeditious resolutions of employment disputes." *Zimmerman Brush* (J.A. 34). The case dispositions that the classification produces are neither just, nor necessarily expeditious, nor even "resolutions." It is the height of injustice to penalize the charging party for a scheduling mistake that he had no opportunity to prevent. The rule does not rationally act as a means of speeding the processing of cases, because the penalty it imposes falls not on the person in control of the process but on one of the victims of the delay. Above all, the rule's arbitrary termination of claims cannot fairly be characterized as "resolutions" of "disputes"; they are technical escapes from liability that never resolve the underlying controversies.

Even if the Illinois Supreme Court's application of the 120 day limit did induce expeditiousness, that objective would be accomplished in a patently arbitrary and irrational way. Indeed, the arbitrary cutoff of claims such as Mr. Logan's defeats the overriding governmental purpose that the FEPA was meant to further. The classification that has been used to cut off Mr. Logan's claim of employment discrimination is irrational and violates his right to equal protection of the laws.

ARGUMENT

I. Due Process Has Been Violated Because Mr. Logan's Action Under The Fair Employment Practices Act Has Been Terminated Solely On Account Of The Negligence Of The Commission's Investigator In Failing To Hold The Fact Finding Conference On Time.

A. Due Process Requires That Mr. Logan Be Given The Opportunity To Be Heard On His Charge Of Employment Discrimination And That A Conscious And Intentional Decision Be Made About Whether He Should Prevail.

The issue presented is whether Mr. Logan was entitled under the Due Process Clause to have his charge of discrimination decided on the merits or be timely notified that it would not be so decided. The Illinois Supreme Court held that it was reasonable for Mr. Logan's discrimination action to be absolutely and finally terminated solely because the investigator negligently and mistakenly scheduled the fact finding conference to be held five days late. Termination of cases solely because of a scheduling mistake by the investigator cannot be permitted under the Due Process Clause. Our citizens are entitled to more; if they resort to our justice system, they are entitled at least to a conscious and intentional decision on the merits of the case or on an issue rationally related to which party ought to prevail. At an absolute minimum, if cases are to be terminated without regard to the merits or the diligence of the adverse parties in meeting their procedural obligations, notice should be given to the party affected so that he can take action to preserve his case. Such notice is essential if even the appearance of fair and evenhanded treatment by the adjudicatory body is to be maintained.

The facts of this case demonstrate the unfairness of the Illinois Supreme Court's ruling. Mr. Logan, proceeding without counsel (as a great many of those who bring charges to the FEPC) diligently performed all that could reasonably by expected of him. Mr. Logan was denied his rights to redress without any decision on his claim wholly because the

investigator misread her calendar and inadvertently scheduled the fact finding conference five days too late. Such a result violates due process. Due process requires that (1) Mr. Logan should have recieved prior notice of the impending termination of his rights and notice of the procedures available within the Commission to complain about such termination, or (2) the inadvertent or negligent failure of the investigator to hold the conference within 120 days should have been excused and a decision rendered in Mr. Logan's charge in the absence of any showing either that Mr. Logan was responsible for the mistake or that the Company was prejudiced by the 5-day delay.

The unfairness and unreasonableness of the process approved by the Illinois Supreme Court is apparent if we consider the role of an attorney, paralegal or law student who has the unpleasant duty of counselling persons like Mr. Logan who have lost their rights solely because the Commission failed to meet one of its statutory deadlines. It can be expected that the client will first inquire why he lost his case and why his employer won. The counsellor will most likely respond in a straightforward way that he lost his case because the Commission was too busy or negligent and did not get to his case in time. The client would probably inquire whether he lost his case because the Commission decided that the Company had not discriminated against him. "No, they never decided anything, they just failed to reach your case in time," the counsellor might reply. "But why then did they decide for the Company?" might be the next question. The counsellor would now recognize that the client does not understand how it is he lost without any decision being made. He would explain to his client again that the Commission failed to perform its duties under the law and that the penalty for this failure has been to dismiss his case. "But why am I being penalized, I didn't do anything wrong. I filed my charge within the time limits. I cooperated with the investigator and never delayed anything. Why should I lose?" At this point the counsellor will likely resort to his ultimate answer and tell the client that he lost not because of his fault but because the law

says so and this is a nation of laws. But then the client will probably ask, "But why didn't they tell me about the deadline, so I could have tried to do something?" The counsellor would surely advise the client that if he had received notice before the deadline had passed, he could have contacted the Commission and asked if it was going to meet the deadline. If the Commission indicated it would not, he might have been entitled to a writ of mandamus or equitable relief to force the Commission to meet the deadline. But now it is too late. His case is closed.

Having been admitted to the state's adjudicatory system, Mr. Logan had a protected interest in being treated fairly and rationally by that system. This principle underlies the opinion in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), in which the Court expressed concern for "a fundamental value in our American constitutional system":

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

Id. at 374. There is neither order nor predictability in an adjudicatory system which negligently extinguishes a cause of action. Such a system makes a mockery of due process of law.

1. Procedural Due Process Requires Prior Notice That Holding The Fact Finding Conference Within The 120-Day Limit Is Mandatory And The Establishment Of Procedures For Complaining To The Commission About Its Failure To Meet The Deadline, Including Notice Of The Procedures.

In the present case, due process could have been satisfied with very little. The Commission's investigator sent a Notice of the Fact Finding Conference to Mr. Logan and the Company requiring them to attend the conference (J.A. 5-6). The Notice did not indicate that the fact finding conference must be held within 120 days of the filing of the charge. At a minimum, Mr. Logan should have been notified that if the fact finding conference was not held within 120 days of his filing of the charge, his case would be terminated. Had he received such notice, he would have had the opportunity to discover the mistake and avoid its consequences by demanding a new date from the investigator or by seeking injunctive relief in court.

This Court has directly held that notice must be provided before the government can revoke a valuable right. In *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), this Court set forth the notice required by due process before a municipality can terminate electric service to a consumer. Two important elements of notice were required to satisfy due process: (1) the consumer must receive notice of the proposed termination of service; and (2) the consumer must actually be given notice of "the availability of an avenue of redress." *Id.* at 13. This Court recognized that the "Final Notice" given by the municipality was "adequate to apprise the [consumer] of the threat of termination of service." *Id.* at 14. Nevertheless, a due process violation was found because the consumer "was never apprised of the availability of a procedure for discussing her dispute 'with management.' " *Id.* at 13-14. In Mr. Logan's case, no notice whatsoever was given that his charge would be extinguished if the Commission's investigator failed to convene the fact finding conference within 120 days.

As in *Memphis Light*, Mr. Logan received no notice of the availability of any administrative procedures by which he could complain about the scheduled date of the fact finding conference and request that it be rescheduled within the 120 day period. *Memphis Light* required that administrative procedures be established and notice provided even though there was a judicial remedy available to the consumer to enjoin the proposed termination of services. The Court considered the fact that utility terminations are the type of disputes for which few consumers will retain counsel. Likewise, the FEPA has designed a system in which laymen can assert their claims without counsel and rely on the Commission to fulfill its requirements in conducting the investigation and determining whether there is sufficient evidence to justify issuing a complaint and holding a hearing. Notice is required to advise laymen of the critical significance of all mandatory deadlines so that they can monitor the progress of their cases and take action to assure that their rights are not lost because one of the deadlines will not be met. Nor does it suffice that there are judicial remedies available to force the Commission to meet its statutory deadlines. Laymen are entitled to an administrative procedure and notice of how to use the procedure to prevent the termination of their rights, just as was required of the municipal utility in Memphis Light.[1]

That due process required prior notice to Mr. Logan can also be demonstrated by applying the test announced in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Justice Powell identified three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used," and "the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and ad-

[1] In other contexts this Court has excused procedural failures by *pro se* litigants which would not have been excused if made by a party represented by an attorney. *See Haines* v. *Kerner*, 404 U.S. 519 (1972); *Conley* v. *Gibson*, 355 U.S. 41 (1957).

ministrative burdens that the additional or substitute procedural requirement would entail." *Id.*

First, Mr. Logan's interest is very important—he is seeking, among other things, to be vindicated through adjudication of his charge of discrimination in employment, to be reinstated to his job, to be awarded back pay and attorneys fees, and to have the company be ordered to terminate its discriminatory activity. *See infra* at 34.

Second, there is a high risk of an erroneous deprivation.[2] There is no correlation between those charges for which the investigator failed to convene a timely fact finding conference and those charges which should be dismissed. If the conference is held too late due to the fault of the charging party, his charge could fairly be dismissed. But no such assertion has been made about Mr. Logan. Also, no consideration of the merits or relative merits of charges is permitted when charges are terminated solely because of the failure to convene a timely fact finding conference. Non-meritorious cases for which a fact finding was held on time, will remain alive and continue to be investigated until there is a determination by the investigator of whether there is substantial evidence to support the charge. The likelihood of an erroneous deprivation is further increased because there is no judicial review of a charge terminated for failure to convene the fact finding conference within the 120 days. If, however, the fact finding conference is held and the investigation is completed, a claimant may ask the Commission to reconsider an unfavorable determination. Rules and Regulations of the Fair Employment Practices

[2] Of course, the "error" at issue is not the likelihood of erroneous determinations that the 120 day time limit has passed, but rather, the likelihood that cases which would have been won, on the merits, will instead be dismissed. "[I]n reviewing state action in [the area of procedural due process] . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Bell* v. *Burson*, 402 U.S. 535, 541 (1971), citing *Willner* v. *Committee on Character*, 373 U.S. 96, 106-107 (1963) (concurring opinion).

Commission, §§4.5, 4.7, 5.7; Appendix to this Brief at 57. The FEPA also provides for judicial review in circuit court. Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53).

Furthermore, the probable value of additional procedural safeguards is very great. The Commission should provide advance notice before the failure to convene a timely fact finding conference can be used as the basis for terminating a charge. The value of advance notice is that it returns control to the charging party to insure that the time requirement is met. If the investigator decides not to reschedule, other legal action could be taken to keep the charge alive. If the charging party did not act then, he could be held accountable for his failure.

Third, the government's interest would be served by a notice requirement, and this safeguard would involve no significant extra cost or administrative burden. The legislature intended that every charging party ultimately receive a decision on his charge. The language of the statute is silent about what should happen in the event that the fact finding conference is not held within the proper time. The public interest weighs heavily in favor of adjudicating the merits of these charges. The legislature has indicated that its policy and purpose for enacting the FEPA is to provide redress for discrimination in employment and clearing employers of unfounded charges. Ill. Rev. Stat. ch. 48, §851 (1979) (J.A. 37). The proposed notice would accomplish these purposes.

The administrative costs are minimal because the FEPC already sends a "Notice of Fact Finding Conference" to both parties. Words should be added indicating that (1) the conference must be held within 120 days from the date the charge was filed or the charge will be dismissed; (2) if the conference has been scheduled to be held later than the 120 days, the charging party should contact the investigator to reschedule the conference or the charge will be terminated; and (3) if the investigator refuses to reschedule the conference within the 120 day period, the charging party is entitled to receive notice of the reasons and a chance to be heard about why the con-

ference should be rescheduled and the investigation continued. The costs of drafting the language for the Notice are very small. There is no increased cost for printing or mailing since the notice is already sent. The only serious administrative costs involve having the investigator check his calendar and state why his calculation of the time period is correct. This too is a minor cost. As shown above, the result of weighing all the interests is overwhelmingly in favor of requiring that prior notice and hearing be provided.

This Court has consistently held that notice is the bare minimum required for due process. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), notice by publication was held to be constitutionally insufficient to alert known trust beneficiaries to the pendency of a judicial settlement of trust accounts. The Court refused to rule that beneficiaries who had not kept informed about the pendency of settlement proceedings had thereby abandoned their claims. The legal fiction that all persons are expected to know the law and their rights was not found to be sufficient. The Court required actual notice before property rights are terminated by an adjudication. In the present case it might be argued that Mr. Logan should have known that Illinois law would be interpreted to require that the fact finding conference must be held within 120 days, checked his calendar, determined the error, and attempted to reschedule the conference. This Court should follow *Mullane* and likewise reject this argument against requiring actual notice here.

Failure to provide notice is an especially significant violation of due process when such failure results in the final deprivation of an important state right. Such notice must occur prior to the deprivation. It is a prerequisite to obtaining a hearing to contest the proposed deprivation. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965) the Court required that a divorced father receive notice sufficient to alert him to an adoption action brought by his ex-wife's new husband, and to afford him an opportunity to present his objections before he finally lost his parental rights. *Id.* at 549. In *Sniadach* v.

Family Finance Corp., 395 U.S. 337 (1969), the Court demanded that a worker be given notice prior to the garnishment of his wages. In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court recognized that the critical functions of the prior notice and hearing requirements are to provide a means for avoiding wrongful deprivations before they occur. In Mr. Logan's case, the lack of notice of the consequences of failing to convene a fact finding conference within 120 days effectively deprived him of all his rights and remedies under the FEPA. By the time Mr. Logan had any idea that he stood to lose his right to use the adjudicatory system provided by the FEPA because of the investigator's negligence, the 120 day deadline had passed.

2. Due Process Was Violated Here Because There Was Never Any Decision Made To Adjudicate Mr. Logan's Rights. Terminating His Rights On Account Of The Negligence Of The Investigator Is Wholly Arbitrary And Irrational.

In the circumstances of this case, due process must also require that Mr. Logan is entitled to have the Commission make a decision on whether there is substantial evidence to issue a complaint. According to the Illinois Supreme Court's decision, the failure of the investigator to hold the fact finding conference within 120 days terminated Mr. Logan's action finally and absolutely.[1] Indeed, it also extinguished the second charge he filed with the Commission even though that second charge was timely filed within 180 days of his firing. No one ever decided whether his claim of discrimination should be terminated "for cause."

A decision based on the merits or on the conduct of one of the parties is a second traditional minimum requirement of

[1] Mr. Logan's claim is thus unlike a charge of employment discrimination filed in the Equal Employment Opportunity Commission ("EEOC"). The claimant always retains his rights to pursue his Title VII action in the United States District Court. 42 U.S.C. §2000e-5(f)(1).

due process.[4] In *Bell* v. *Burson*, 402 U.S. 535 (1971), this Court struck down a statute which authorized the suspension of an uninsured motorist's driver's license without a preliminary inquiry to determine whether there was a reasonable possibility that a judgment would be rendered against the licensee. *Id.* at 540.

On the other hand, in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court held that Social Security disability benefits could be terminated without a prior full hearing because several merit-based decisions were required, *i.e.*, preliminary state review of medical evidence, determination by administrative officials after notice and comment, *de novo* review and formal hearing. *See also Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits not to be terminated without a decision on the merits).

In the next section of this brief, Mr. Logan argues (*infra* at 29) that a critical factor in determining that he has a protected interest is that the FEPA, when read as a whole, has created entitlements which can be terminated only "for cause." Once the substantive rights are determined to be subject only to a "for cause" termination, the procedures must not circumvent the "for cause" requirement. If they do, due process is violated.

This analysis of separating the procedures from the substantive right has been used in *Bell* v. *Burson*, 402 U.S. 535 (1971). This Court rejected procedural requirements of a Georgia statute that called for the suspension of a driver's license of anyone involved in an accident who failed to post

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[4] Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for hearing appropriate to the nature of the case," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The exact timing of the hearing may vary. *Opp Cotton Mills, Inc.* v. *Administrator, Department of Labor*, 312 U.S. 126, 152-53 (1941). The degree of formality may vary. *Goss* v. *Lopez*, 419 U.S. 565, 583 (1975).

bond or carry liability insurance. The Court determined that the only purpose for the bond was to obtain security to pay any damages for which the driver might ultimately be found liable. The Court concluded, therefore, that a determination of the probability of liability must be made in the suspension proceeding before the license could be suspended.

A decision about whether there is "cause" to require posting the bond and suspending the license for failure to do so was the necessary procedural corollary to the substantive entitlement. Once the state creates such an entitlement, the procedures must provide for a decision based on "cause." In this case the use of the Commission's failure to meet the 120 day deadline to defeat claims subverts the "for cause" requirement of the substantive right created by the FEPA. If allowed to stand, this mandatory time limit would convert the "for cause" substantive requirement into one merely "at will." Due process is therefore violated because the state has eliminated the entitlement to a "for cause" determination contemplated by the FEPA's creation of the substantive right.

In both *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties even though the alteration would involve only a temporary deprivation. The need for a decision on the merits is even more acute when the deprivation of an interest is permanent. In *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court found that the post-suspension hearing provided by the statute violated due process because it was not held soon enough after the suspension to avoid a *de facto* final deprivation. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court found that the temporary suspension of students from public schools without a hearing addressing the conduct of the students violated due process because the temporary suspension would have a permanent affect on the students' reputations and future educational and employment opportunities. While the degree of finality in both these cases was great

enough to invoke a protected interest, the finality of Mr. Logan's deprivation is far more severe. While the horse trainer in *Barry* may or may not lose his livelihood without a sufficiently timely post-suspension hearing, and the students in *Goss* may or may not be able to overcome the blemish on their records of a temporary suspension from school, Mr. Logan will lose his rights to obtain full relief under the FEPA for the discriminatory conduct of the Company against him.[5]

[5] Justice Stevens has suggested that in the context of property deprivations a "post-deprivation state remedy" may satisfy due process. *Ingraham* v. *Wright*, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting).

> When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole. . . .

Id. See Kimbrough v. *O'Neil*, 523 F.2d 1057, 1062 (7th Cir. 1975) (Stevens, J., concurring), *aff'd on rehearing en banc*, 545 F.2d 1059 (1976). *Cf., Bonner* v. *Coughlin*, 517 F.2d 1311, 1318-1320 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976).

Application of Justice Stevens' approach establishes that due process has been violated in this case. It is not certain that a compensatory remedy is provided by Illinois law against the investigator or, under the Court of Claims Act, against the Commission. Ill. Rev. Stat. ch. 37, §439.1 *et seq.* (1979). Even if it were, Mr. Logan could not obtain the same remedies he would have had against the company under the FEPA. He would not be reinstated with the company. He would not obtain an order against the company to cease its discriminatory practices against the handicapped. Mr. Logan's employment record would not be cleared of the discriminatory discharge. And he would not receive vindication of his right to be free from unlawful discrimination. These remedies would not be available in an action against either the investigator or the Commission.

The only alternative remedy Mr. Logan might have against the company would be an action for damages provided by the Equal Opportunity for the Handicapped Act ("EOHA") which also makes it a misdemeanor for employers to engage in discriminatory employment practices. Ill. Rev. Stat. ch. 38, §65-21 *et seq* (1979). This alternative does not offer as broad a range of remedies as the

The termination of Mr. Logan's claim prevented him from receiving a decision based on the merits or on the conduct of one of the parties. First, there was no evaluation of the strength of his case. Mr. Logan agrees that the legislature could provide for the screening of cases by the Commission and that the procedures provided in the FEPA would have been constitutionally sufficient if such a screening had indeed been done. Mr. Logan also agrees that the use of the "substantial evidence" test in the FEPA for the evaluation of cases is appropriate. In the instant case, however, neither the investigator nor the Commission ever made such a determination. Mr. Logan, in fact, is worse off than if the Commission had found no substantial evidence, because that finding would have been reviewable in the state courts under the Administrative Review Act. *See* Ill. Rev. Stat. ch. 48, §860 (1979) (J.A. 53). Mr. Logan is instead left with no judicial review and no cause of action due to a process which is purely arbitrary.

FEPA provides (e.g., it contains no provision for the award of attorney's fees). Also the definition of the handicapped and the determination of what constitutes defenses to an EOHA action has not been consistently determined by Illinois courts. There are only two appellate cases interpreting the EOHA. Although a generous construction was adopted in *Lyons* v. *Heritage House Enterprises*, 92 Ill.App.3d 668, 415 N.E.2d 1341 (4th Dist. 1981), the narrower construction approved in *Advocates for the Handicapped* v. *Sears, Roebuck & Co.*, 67 Ill.App.3d 512, 385 N.E.2d 39 (1st Dist. 1978) would control because Mr. Logan's action arose in Cook County.

Furthermore, such an action by Mr. Logan would surely be met by arguments that the action is precluded by the Illinois Supreme Court's decision. At the time Mr. Logan's FEPA charge was terminated by the writ of prohibition, the 180 day time period for filing a charge had not yet run. He therefore filed a second identical charge. The court ruled that failure to terminate the second charge would "frustrate the design of [the Act]" citing as one of its concerns the prejudice to the employer's rights. *Zimmerman Brush Co.* v. *Illinois Fair Employment Practices Commission*, (J.A. 35-36).

Second, the termination of Mr. Logan's charge was not based on any procedural failing by him. Mr. Logan did not delay the proceedings. The termination is unlike dismissal for failure to comply with a statute of limitations. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for failing to meet statutory deadlines. In this case, Mr. Logan filed his charge only five days after the discriminatory act, well within the 180-day time limit provided by the FEPA. He complied with all the procedural requirements of the statute, only to have his claim extinguished because of neglect by the administrative agency processing it.

Martinez v. *California*, 444 U.S. 277 (1980), held that a state may limit the defenses available against certain statutory claims, provided the conduct of the state is not "wholly arbitrary or irrational." *Id*, at 282. Providing for the termination of Mr. Logan's charge is wholly arbitrary and irrational in violation of the due process clause, because it is based neither on an evaluation of the strength of his claim nor on a determination of his diligence. In our system of resolving private disputes through adjudication by the state rather than through self-help and other means, it is wholly arbitrary and irrational to "adjudicate" by an accident or an inadvertent, negligent act rather than a conscious decision.

B. Mr. Logan's Right To Use An Adjudicatory System Was An Entitlement Conferred Upon Him By The State And Was A Property Interest Protected By Due Process.

Mr. Logan had a protected property interest in the use of an adjudicatory system of the state to vindicate his right to be free from discrimination in his employment. The State of Illinois created an entitlement by enacting the Fair Employment Practices Act, which provides victims of discrimination with a forum in which to seek recovery and procedures to facilitate resolution of disputes. By accepting Mr. Logan's charge, the state acknowledged that it had granted him an entitlement which the FEPA states can only be permanently extinguished upon a showing of cause.

This Court has recognized that a plaintiff's cause of action can be a protected interest. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), notice by publication was held insufficient to alert known trust beneficiaries to the pendency of a judicial settlement of trust accounts. The Court recognized that the beneficiaries had two interests at stake. One was an interest in the corpus of the trust, which is "presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest." *Id.* at 313.

The other interest was in "their rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.* Although an interest in a suit for breach of fiduciary duty arises from the trust itself, it clearly is distinct. A beneficiary's suit against a trustee need not be directly related to efforts to protect the corpus of the trust; indeed, a beneficiary may recover for breach of fiduciary duty even if impairment of the trust fund is merely remote or speculative. In *Mullane,* a beneficiary's right of action against his trustee would have been cut off if he did not appear at the settlement hearing and assert that a fiduciary duty had been breached. Thus, it was the right to sue that was impaired by lack of notice. In holding that due process required adequate notice, the Court recognized that the beneficiaries' cause of action was a protected property interest.

The source of the protected interest in *Mullane* was New York statutory and common law. As this Court has long recognized, what is property within the meaning of the Due Process Clause is determined by "an independent source such as state law." *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1, 9 (1978). *See also Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). Likewise, an examination of Illinois law demonstrates that Mr. Logan has a protected property in-

terest. When Mr. Logan filed his charge under the FEPA, the State of Illinois entitled him to adjudicate his claim.[6]

The FEPA provides that when a person has been the victim of an unfair employment practice he begins his action by filing a charge with the Fair Employment Practices Commission. Ill. Rev. Stat. ch. 48, §858(a) (1979) (J.A. 45). The Commission then undertakes an investigation to ascertain the facts relating to the alleged discrimination. After this investigation, which includes a fact finding conference that both the employer and the employee must attend, the Commission's investigator determines whether there is substantial evidence that a discriminatory employment practice has been committed. If the investigator finds no substantial evidence, the charging party can file a request for reconsideration and submit additional evidence in support of his allegation. If the investigator, or the Commission upon reconsideration, finds substantial evidence, the Commission issues a complaint. The

[6] The action created by the FEPA is to be sharply distinguished from an enforcement proceeding conducted by an agency or government official such as that provided for by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* Under that statute, the action for an unfair labor practice vests in the National Labor Relations Board ("NLRB") and the prosecution of such a case is controlled entirely by the NLRB General Counsel. The General Counsel's refusal to issue a complaint is not reviewable either by the NLRB or, in general, by the courts. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975).

By contrast, a victim of employment discrimination is given a private right of action under the FEPA. The presentation of an FEPA case is controlled entirely by the complainant. The complainant files appropriate motions, conducts discovery and pre-hearing procedures, and presents evidence and argument. Ill. Rev. Stat. ch. 48, §858.01(b) (1979). Additionally, the FEPA gives a complainant the right under the Administrative Review Act for judicial review in the Circuit Court of any "order of the Commission," including review of a Commission's finding of no substantial evidence or a final Commission decision on the merits. Ill. Rev. Stat. ch. 48, §860 (1979).

charging party then prepares and presents his case before an administrative law judge at a full evidentiary hearing. The judge issues a recommended order which is reviewed by the Commission, which then issues a final order. At each step of the process, the decision to proceed or terminate the action must be made "for cause" — that is, whether substantial evidence has been shown by the investigation, whether an unfair employment practice has been proven at the hearing, or whether at any point either party should lose because he has failed to act diligently.

The "for cause" requirement is one of the necessary elements this Court considers in determining whether there is a property interest. Several cases of this Court show that a "for cause" requirement is the primary indicium of the existence of a constitutionally protected statutory entitlement. In *Memphis Light, Gas & Water Division* v. *Craft,* 436 U.S. 1 (1978), the Court found that under Tennessee law utility services could not be terminated if there was a bona fide dispute over the amount of the bill and whether it was due and owing. *Id.* at 9-10. The Court stressed that "[b]ecause petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." *Id.* at 11-12.

In *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970), the Court found a protected property interest in welfare benefits noting that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." Because the state could not terminate a recipients' benefits without cause, the Court found that the requirements of due process applied. In *Goss* v. *Lopez,* 419 U.S. 565, 573 (1975), a protected interest in the right to education was recognized because, under Ohio law, students may not be suspended from school "without any grounds whatsoever." In *Barry* v. *Barchi,* 443 U.S. 55 (1979), a horse trainer's professional license was held to be protected because the license could not be revoked unless the trainer was found to have been "at least negligent" in allowing his horses to race while drugged. *Id.* at 64.

In contrast, the Court has found no due process protection for those interests which may be terminated for any reason whatsoever. In *Bishop* v. *Wood,* 426 U.S. 341 (1976), the Court decided that under North Carolina law a police officer's job was terminable at will and without cause; hence no protected interest was implicated. In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the Court was divided over whether Kennedy had received sufficient process when he was discharged from public employment. All nine Justices agreed, however, that Kennedy had a protected interest because his employment was terminable only "for cause."

These cases demonstrate the critical importance of "for cause" in determining whether an individual has an interest entitled to due process. The FEPA mandates a "for cause" showing before final disposition can be made of a charge of employment discrimination. The investigator must determine whether there is substantial evidence, and the administrative law judge and the Commission must decide whether an unfair employment practice has been committed. Of course, the rights of either party may be terminated at any stage if the party fails to act with due diligence.

The Court also looks to the importance of an underlying interest in deciding whether there is a property interest to which due process protection attaches. *Bell* v. *Burson,* 402 U.S. 535 (1971), involved the suspension of the driver's license of a minister who needed the use of his car in his work. The Court determined that "continued possession [of a license] may become essential in the pursuit of a livelihood." *Id.* at 539. Because employment was deemed to be important, the Court found the driver's license to be a protected interest. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), the Court found a protected interest in wages subject to garnishment proceedings. According to the Court, "[a] prejudgment garnishment . . . may impose tremendous hardship on wage earners with families to support." *Id.* at 340. In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court found a protected property interest in the continued receipt of state

welfare benefits. The Court underscored the importance of welfare payments by noting that "welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," and that welfare preserves the individual recipient's dignity by "meeting the basic demands of subsistence." *Id.* at 265. In *Goss* v. *Lopez,* 419 U.S. 565, 575 (1975), the Court found a protected interest in not being suspended from school, stating that charges of misconduct resulting in suspension could "interfere with [students'] later opportunities for . . . employment."

The importance of the interests protected by the FEPA also supports the conclusion that Mr. Logan's right to use its adjudicatory system be accorded due process. The legislature recognized that employment discrimination wastes "the productive capacities of individuals . . . [and] deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living. . . ." Victims of discrimination may be forced to "resort to public charity," and the anger bred by discriminatory treatment "may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare." Ill. Rev. Stat. ch. 48, §851 (1979) (J.A. 37). The FEPA gives meaning to these important interests by entitling aggrieved individuals who have filed their charges to use the Commission's adjudicatory system to prosecute their claims. An aggrieved party is entitled to have the Commission investigate his charge and mediate between the parties. The FEPA protects the claimant against discrimination because he "has opposed any practice forbidden in [the FEPA]" or because he "has made a charge, testified or assisted in any investigation, proceeding or hearing under [the FEPA]." Ill. Rev. Stat. ch. 48, §853(d) (1979) (J.A. 40). If the claimant prevails, the FEPA provides that the Commission can order reinstatement, payment of back pay and attorney's fees, and direct the employer to cease the discriminatory practices. Ill. Rev. Stat. ch. 48, §§858, 858.01 (1979) (J.A. 46, 48-49). The benefits granted by the FEPA are no less important state entitlements than the driver's license in

Bell, the wages in *Sniadach*, the welfare payments in *Goldberg*, and the public education in *Goss*.

As the reasoning of a six member majority in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) suggests, Mr. Logan's substantive rights to use the FEPA's adjudicatory system cannot be limited by procedures that violate due process. *Id.* at 211 (Marshall, J., dissenting). As stated by Justice Powell, the view that a statute can simultaneously create protected interests and limit those interests by procedures that violate due process

> misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee . . . [The legislature] may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Board of Regents* v. *Roth*, [408 U.S. 564 (1972)]; *Perry* v. *Sindermann*, [408 U.S. 593 (1972)].

Id. at 167 (Powell, J., concurring).

Thus, the FEPA's procedures, including the requirement that the FEPC convene a fact finding conference within 120 days of the filing of the charge, must satisfy the demands of due process. The Illinois Supreme Court, in its opinion below, defined Mr. Logan's interest before analyzing the attendant procedures. "The statutory scheme here was to provide, through administrative and judicial channels, a means of relief from discriminatory employment practices." (J.A. 34). Only after the interest was defined by the court did it analyze the procedures to determine whether or not they comported with due process requirements. "The legislature could establish reasonable procedures to be followed upon a charge, and the observance of them here did not violate his constitutional rights." (J.A. 34-35).

Recognition that Mr. Logan's right to utilize the Commission's adjudicatory system is a protected interest does not require recognition that all causes of action are protected interests.[7] Mr. Logan's interest came into being only when he filed his charge and he was granted access to the adjudicatory system established by the FEPA. Thus, the question of whether a plaintiff has a protected *right of access* to the courts — the question addressed in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), and *United States* v. *Kras*, 409 U.S. 434 (1973) — is not implicated in the present case.

The distinction between cases where plaintiffs seek access to the courts and cases where plaintiffs have already been granted access is closely related to the distinction made be-

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[7] In *Paul* v. *Davis*, 424 U.S. 693 (1976), the Court held that where state law has not guaranteed present enjoyment of reputation, an individual's interest in reputation is not a liberty or property interest under the Due Process Clause. The Court expressed its concern that to hold otherwise "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." *Id.* at 699. *See also Bishop* v. *Wood*, 426 U.S. 341, 349-50 (1976).

In light of this concern, it should be pointed out that for this Court to hold that the termination of Logan's claim violated due process would not open the federal courts to a multitude of actions. Logan does not ask that his employment discrimination action be adjudicated in a federal forum, nor does he seek a federal cause of action against the state or the state agent whose negligence deprived him of his right to proceed. Logan asks only that his cause of action be reinstated before the FEPC and that he have the same opportunity to present his case and have state judicial review that is afforded all other complainants whose claims were not negligently extinguished. Thus, the present case presents no threat to the principle of comity to which this Court adheres: that state courts have sole jurisdiction over actions arising from state law, but that final judgments of state courts are subject to direct review by this Court when the validity of a state statute is questioned "on the ground of its being repugnant to the Constitution . . . ." 28 U.S.C. §1254 (1976).

tween parties contesting the denial of some governmental benefit and parties contesting the revocation of such benefits. In the latter, parties contesting the revocation of governmental benefits have been found to have a protected interest while parties merely contesting the denial of initial receipt of such benefits have not. *See, e.g., Bell* v. *Burson,* 402 U.S. 535, 539 (1971) ("Once licenses are issued . . . . [they] are not to be taken away without that procedural due process required by the Fourteenth Amendment"). *See also* Friendly, *"Some Kind of Hearing"*, 123 U.Pa.L.Rev. 1267, 1296 (1975) ("[T]here is a human difference between losing what one has and not getting what one wants"). *Quoted with approval in Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 10 (1979). A victim of employment discrimination may have no constitutional right of access to an adjudicatory system for the vindication of his interest in employment free from discrimination. Mr. Logan does not contend that the state was obliged to create a cause of action for victims of discrimination or a quasi-judicial forum for the adjudication of claims. Nor does Mr. Logan argue that the state may not propound rational rules which may effectively deny some aggrieved individuals access to an adjudicatory system. This case involves no question of access because the state granted Mr. Logan access to the system which it had created for adjudicating employment discrimination claims. When Mr. Logan invested his time and efforts in the filing of his charge and it was accepted by the Commission, he acquired an entitlement that the state could not extinguish except for cause.

C. Appellant Has A Liberty Interest Which Should Be Protected By The Due Process Clause Of The Fourteenth Amendment.

Mr. Logan had a liberty interest protected by the Fourteenth Amendment. This protected interest consisted of a cumulation of interests taken from him as a result of the Fair Employment Practices Commission's termination of his charge of discrimination. A liberty interest originates from one of two sources: it may "originate in the Constitution" or

it may have "its roots in state law." *Meachum* v. *Fano*, 427 U.S. 215, 226 (1976). Additionally, as Justice Stevens noted in *Meachum*, liberty may have a larger scope than that which is defined by law. *Id.* at 233 (Stevens, J., dissenting).

Mr. Logan was deprived of (1) the right to have the Fair Employment Practices Commission adjudicate his claim and determine whether he should be reinstated in his former job (*see supra* at 30); (2) the right to have the Commission determine whether he was entitled to back pay, attorney's fees and other money damages (*see supra* at 30); (3) the entitlement created by the state not to be discriminated against by his employer (*see* Ill. Rev. Stat. ch. 48, §851); (4) the right to have the Commission determine whether to clear his record for purposes of pursuing future employment (*see Goss* v. *Lopez*, 419 U.S. 565, 575 (1975)); (5) the right to have the Commission vindicate him before his co-workers and peers (*Goss* v. *Lopez*, 419 U.S. at 575) and the community (*Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972)), and to restore his dignity and self-esteem (*Meachum* v. *Fano*, 427 U.S. at 234) by determining whether the Company discriminated against him and wrongly fired him; (6) the right granted by statute to have administrative review in the Circuit Court of Cook County to correct the misimpression among his co-workers, peers and the community that, by terminating his charge, the Commission had concluded that he had been properly fired for non-discriminatory reasons; and (7) the right to receive the valuable benefit of an investigation and hearing provided by the Commission.

Although a direct nexus is required between state action and the deprivation of property interests, this Court has indicated that a direct nexus is not essential to the existence of a protected liberty interest. Where state action has ramifications in wholly private areas which damage a person's interests, a deprivation of liberty may occur.

In *Goss* v. *Lopez*, 419 U.S. at 575, the court stated that where the state had taken action which "could seriously damage the students' standing with their fellow pupils and

their teachers as well as interfere with later opportunities for higher education and employment," a liberty interest has been affected. Although it is not the state which will directly deny the student "later opportunities for higher education and employment," the state's actions have been a factor in bringing about that possibility. The Court has also held that it is not essential that later ramifications be predicted with absolute certainty. In *Goss* v. *Lopez,* there was no certainty that the students' reputations would suffer or that the students would be denied higher education or employment.

Mr. Logan's liberty interest is not diminished merely because the job from which he was fired was not government employment. It was the termination of Mr. Logan's charge, not the actual act of being fired, which formed the basis of state action in this case. This termination deprived Mr. Logan of the opportunity to obtain reinstatement and damages. In *Greene* v. *McElroy,* 360 U.S. 474 (1959), the deprivation of *private* employment, caused by government action, was held to be a sufficient interest to invoke due process protection.

The instant case further resembles *Goss* v. *Lopez* because here, as there, the deprivation of a liberty interest has been coupled with the deprivation of a property interest. In *Goss* v. *Lopez,* state statutes created a right which entitled the students to an education and to attend school. In the instant case, the FEPA entitles protected individuals to be free from discrimination in employment and to utilize the FEPA's adjudicatory system.

Some of the interests enumerated above might be insufficient, if considered alone, to constitute a protected interest And some of the interests, which were discussed above at 30, have traditionally been perceived as having indicia of property. Recently, however, this Court has recognized that a combination of different types of interests may constitute a liberty interest, even though none of the interests taken alone would have qualified.

This Court has held that government employment terminable at will, without more, is insufficient to create a property interest (*Bishop* v. *Wood,* 426 U.S. 341 (1976)), and that defamation by state employees, without more, is insufficient to create a liberty interest (*Paul* v. *Davis,* 424 U.S. 693, 709 (1976)). A protected liberty interest has been found, however, where these two elements are simultaneously present.

In *Owen* v. *City of Independence,* 100 S.Ct. 1398 (1980), the Court implied that combining two interests — neither of which when taken alone would be protected — resulted in the creation of a liberty interest. In that case, the plaintiff's position as Chief of Police was terminable at the will of the City Manager. The employment, taken alone, was not a property interest protected by the Fourteenth Amendment. Because the city was responsible for "impugning the petitioner's honesty and integrity," in addition to terminating his employment, the individual's interest constituted a protected liberty interest.[8] *Id.* at 1407, n.13.

Justice Rhenquist had used a similar test in his opinion in *Paul* v. *Davis,* and declined to find a protected interest in one's "reputation alone, apart from some more tangible interests." *Id.* at 701. Accordingly, he concluded that defamation of an individual by a city police department, without an accompanying deprivation of some other state-created right, was insufficient to receive protection under the due process clause. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971) was distinguished because the defamation there resulted in the termination of Constantineau's right to purchase alcoholic beverages. The Court held that those two elements — neither of which alone would have been sufficient to constitute a protected interest — may be joined to create a liberty interest.

[8] The Court cited *Board of Regents* v. *Roth,* for the proposition that the plaintiff's loss of employment, coupled with a "charge against him that might seriously damage his standing and associations in his community," *id.* at 573, was sufficient to establish a protected interest. *Owen* v. *City of Independence,* 100 S.Ct. at 1406-1407, n.13.

The Court's recent cases defining protected liberty interests, therefore, have found a liberty interest where no property interest was found. Several Courts of Appeals have concurred with this reading of the Court's recent cases. In *McGhee* v. *Draper*, 639 F.2d 639 (10th Cir. 1981), the failure to renew a teacher's contract, combined with the accompanying damage to reputation, was sufficient to invoke due process protection. The Tenth Circuit held that even though there was no property interest in non-tenured employment (citing *Roth*) and no liberty interest in reputation (citing *Paul* v. *Davis*), the combination of the two constituted a liberty interest. "Plaintiff's alleged reputational damage must be entangled with some other 'tangible interests such as employment.' [*Paul* v. *Davis*, 424 U.S.] at 701. Plaintiff must be allowed to convince the trier of fact that these elements are present." *McGhee* v. *Draper*, 639 F.2d at 643.

Similarly, in *Marrero* v. *City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), injury to the reputation of a company, combined with damage to its goodwill, constituted a protected liberty interest. The Fifth Circuit relied on *Paul* v. *Davis* for the identical proposition: "[A] liberty interest is implicated only when an individual's reputation is stigmatized in connection with the denial of some specific constitutional guarantee or of some 'more tangible' interest. . . . However, the Court [in *Paul* v. *Davis*] indicated that the 'plus' of the stigma-plus requirement need not itself be a protected liberty or property interest." *Marrero*, 625 F.2d at 512-513 n.17.[9]

Under this approach of adding together the various interests given by the state, Mr. Logan has been deprived of a

[9] *See also: Dennis* v. *S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir. 1978) (due process rights implicated where an individual is " 'stigmatized in connection with a denial of a right or status previously recognized under state law,' " quoting *Moore* v. *Otero*, 557 F.2d 435, 437 (5th Cir. 1977)); *Johnson* v. *Rogers*, 621 F.2d 300 (8th Cir. 1980); *Colaizzi* v. *Walker*, 542 F.2d 969, 973 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977); and *Larry* v. *Lawler*, 605 F.2d 954 (7th Cir. 1978).

liberty interest and was entitled to due process. As noted above, Mr. Logan was deprived of a variety of interests when his charge of discrimination was terminated.

(1) Mr. Logan has lost the right afforded victims of discrimination under the FEPA to adjudicate his claim and obtain reinstatement. The state affirmatively granted him the right to return to his former job if he could prove he was discriminated against by his employer. Furthermore, like welfare benefits in *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970), Mr. Logan's employment provided him with "the very means by which to live . . . ."

(2) Mr. Logan has also lost the right to have the Commission determine whether he is entitled to back pay, attorneys' fees, and other money damages. Like the right to be reinstated, this entitlement was affirmatively granted to Mr. Logan by the FEPA. Thus, Mr. Logan was deprived of the opportunity to recover the money lost as a result of the Company's discriminatory practices.

(3) The FEPA and the Illinois Constitution also entitled Mr. Logan to the right, once employed, to continue in that employment without being discriminated against. The right not to be discriminated against is of fundamental importance in this country and lies at the very heart of the Fourteenth Amendment's prohibition against unequal treatment of similarly situated individuals.

The importance of the FEPA's statutory entitlement is underscored by the fact that freedom from employment discrimination on the basis of handicap is prohibited by the Illinois Constitution. The special protection afforded victims of handicap discrimination in Illinois is evidenced by the language of the state constitution. Article 1, Section 19 provides in pertinent part that "[a]ll persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer."

(4) Mr. Logan also has suffered a loss with respect to his ability to pursue future employment. Without being afforded the opportunity to have a decision rendered on his discrimination charge, Mr. Logan has a black mark on his employment record, which now shows that he was unable to perform his previous job adequately. As Justice White noted in *Goss* v. *Lopez,* 419 U.S. 565 (1975), where an action by the state "interfere[s] with later opportunities for . . . employment," a liberty interest is implicated. 419 U.S. at 575. As in *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 102 (1976), Mr. Logan had been given the right by the state not to be subjected to the "added disadvantage [of] ineligibility for employment in a major section of the economy." Although the loss of a single job does not normally result in such an ineligibility, Mr. Logan's future employment opportunities for a great many jobs are adversely affected by having the wrongful firing included on his employment record.

(5) Mr. Logan has been deprived of the esteem of his co-workers because he was fired by his employer, allegedly on the basis of job performance. In *Goss* v. *Lopez,* in determining that there was a liberty interest, the Court stressed the fact that the student had an interest in his reputation among fellow students and in the esteem of his peers. Mr. Logan's interest in his reputation and the esteem of his co-workers should also be taken into account in defining his liberty interest. Mr. Logan as also suffered "damage [to] his standing and associations in his community." *Board of Regents* v. *Roth,* 408 U.S. at 573. The Fair Employment Practices Act gave Mr. Logan the right to employ the Commission's procedures to clear his name and his employment record.

(6) Mr. Logan has suffered a further stigma by having filed a claim with the Commission that he was wrongly fired, and then having that claim terminated without a decision on the merits. That he "lost" his suit before the Commission can only reinforce the belief among his co-workers that he was legitimately fired by the Company for reasons of poor job performance.

(7) Finally, Mr. Logan lost his right to receive the valuable benefits of an investigation and hearing provided by the Commission. This right was conferred, as a benefit, for victims of employment discrimination. As such, Mr. Logan was entitled to full use of that benefit.

The right to utilize an adjudicatory system has been recognized by this Court in the context of prisons. In *Bounds* v. *Smith,* 430 U.S. 817 (1977), the Court held that prisoners have a right of access for filing civil rights actions and prosecuting criminal appeals:

> By contrast [to a discretionary review petition] in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or *vindication of fundamental civil rights.* Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and *civil rights actions* are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights.

Id. at 827 (citations omitted; emphasis added). Similarly, Mr. Logan seeks to utilize the benefits of the adjudicatory system which the state created for the purpose of hearing and deciding employment discrimination cases. Mr. Logan seeks to vindicate an important civil right — the right to be free from unlawful discrimination in his employment.

The sum of the interests enumerated above constitutes a liberty interest protected by the due process clause.

II. Termination Of Mr. Logan's Employment Discrimination Claim Violates Equal Protection.

Termination of Mr. Logan's employment discrimination claim solely because the investigator failed to convene the fact finding conference within 120 days is the application of an irrational governmental classification. The Illinois Supreme Court interpreted section 8(b) of the FEPA in such a way that all claimants for whom the investigator does not schedule a fact finding conference within 120 days of filing will suffer

the complete loss of their statutory remedy for unlawful employment discrimination. The result is that claims filed at the same time, involving the same allegations, and pursued with equal diligence, will be heard or dismissed depending entirely on the irrational criterion of whether the investigator met the 120 day limit for convening the conference.

The consequences of being in one or the other class of claimants are striking. Claims of litigants in the disfavored class are extinguished with no evaluation while claims of litigants in the favored class receive decisions on the merits. Moreover, the FEPA provides that the latter class's decisions are subject to judicial review. *See supra* at 28.

The Equal Protection Clause of the Fourteenth Amendment requires that all governmental classifications meet a minimum standard of rationality. "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson,* 101 S.Ct. 1074, 1080 (1981). *See Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

The Illinois Supreme Court's application of the 120 day requirement to terminate charges of discrimination fails to meet the two express purposes of the FEPA: to protect persons from discrimination in employment and to protect employers from unfounded charges of discrimination. The classification furthers neither of these objectives, for each may be realized only through some evaluation of the merits of the charge. Whether the investigator schedules the fact finding conference within 120 days bears no relation to the merits. Indeed, the termination takes place prior to any evaluation of the strength of the charge. The classification thus violates equal protection because it "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425 (1961).

It can hardly be argued that arbitrary termination of a category of charges furthers the goal of protecting workers from employment discrimination. Under a system in which a

claim may be extinguished before any evaluation of its merits, egregious instances of employment discrimination will go unremedied. The overriding legislative purpose is to give a remedy to victimized workers and to ensure that employers who are guilty of discriminatory practices are ordered to stop.[10] This can be accomplished only if cases are heard and decided.

The classification also fails to further the purpose of protecting employers from unfounded charges of discrimination. Whether the claimant has a fact finding conference within 120 days of filing his charge has nothing to do with whether the charge is well founded. His charge is terminated before anyone has had the opportunity to consider whether it is well founded. In *Lindsey* v. *Normet,* 405 U.S. 56 (1972), the Court held that Oregon's double-bond requirement in forcible entry and detainer appeals violated equal protection. The requirement was said to discourage unfounded appeals. The Court, however, concluded, "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78. In *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966) the Court ruled that a state violated equal protection by imposing the obligation to pay for an appeal transcript only on prison inmates. The Court stated that the classification the state created was not rationally related to the purpose of discouraging frivolous appeals. "By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed." *Id.* at 310.

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[10] The FEPA's declaration of policy sets out important public policies underlying the goal of protecting employees from discriminatory practices:

> [D]enial of equal employment opportunity . . . with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may

Like the classifications in *Lindsey* and *Rinaldi,* the classification in the instant case fails to separate those claims that are unfounded from those that are justified. Instead, it classifies claimants on a wholly irrelevant criterion: whether the fact finding conference is held on time. Indeed, the instant classification is even more offensive than those in *Lindsey* and *Rinaldi,* for unlike those classifications, it does not discourage the assertion of claims, but instead completely eliminates claims. The result is that utterly unfounded claims may be heard, decided and judicially reviewed, while just claims are discarded without the slightest examination.

In the Illinois Supreme Court's Opinion, application of the 120 day time limit on fact finding conferences so as to terminate charges prior to any evaluation of their merits apparently has a secondary purpose: the "just and expeditious resolutions of employment disputes." *Zimmerman Brush* (J.A. 34).[11] The classification fails to bear a rational relation even to this asserted purpose.[12]

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cause conflicts and controversies resulting in grave injury to the public safety, health and welfare . . . .

Ill. Rev. Stat. ch. 48, §851 (1979).

[11] The uncertainty exists because the Illinois Supreme Court speaks at length of the goals of an early fact finding conference, including "[t]he public interest in an expeditious resolution of disputes . . . ." *Zimmerman Brush* (J.A. 33). Mr. Logan, of course, takes no issue with the requirement of a fact finding conference as early in the dispute as possible. At issue, however, is the constitutionality of the requirement that the class of claimants that has not been provided an early fact finding conference must suffer an additional loss: the blanket and arbitrary dismissal of its claims. The Illinois Supreme Court's justification for this draconian application of the 120 day rule is less clear. The court at one point refers to the application as one of the "reasonable procedures to be followed upon a charge." *Zimmerman Brush* (J.A. 35). As demonstrated, however, the procedure is anything but reasonable as a means to meet the goals of the FEPA.

[12] The dissent of Justice Powell in *Schweiker* v. *Wilson,* 101 S.Ct. at 1085, joined by Justices Brennan, Marshall and Stevens, reasons, "When a legislative purpose can be suggested only by the ingenuity

Where the termination of the charge is not based on an evaluation of its merits or on the diligence of the claimant, employment disputes are not resolved justly or expeditiously, because they are not resolved. "Resolution" presupposes a conscious decision based on some rational criteria.[13] An inadvertent failure to schedule a timely fact finding conference does not result in the resolution of a dispute but merely in its termination. The employee loses his remedy for the discriminatory treatment he suffered. Conversely, the employer is not vindicated by a decision that it was not guilty of the charge of discrimination.

Even if the termination of a claim due to the investigator's error in scheduling can be characterized as a "resolution" of the case, it is certainly not a "just resolution." A just resolution should be based on either the merits of the claim or the diligence of either party in meeting his procedural obligations. Under the provision at issue,

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of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Id.* at 1088. Accordingly, the Court should receive such hypotheses with "some skepticism," and "require that the classification bear a 'fair and substantial relation' to the asserted purpose. *See Royster Guano* v. *Virginia,* 253 U.S. 412, 415 (1920)." *Id.* The purpose at issue, the expeditious resolution of disputes, is just such a hypothesis, proposed by a lawyer defending the statute and adopted by the court below. Indeed, the government lawyers representing the Illinois Human Rights Commission have consistently argued that the Legislature intended neither that the statutory deadline should be mandatory nor that charges such as Mr. Logan's should be terminated. Because the legislative classification does not even meet the minimum standard of rational relation to the asserted purpose of expeditious resolution of disputes, *a fortiori* it fails to withstand the "marginally more demanding scrutiny," *id.*, that four members of the Court would apply.

[13] That the Illinois Legislature intended a conscious resolution of employment disputes is clear from the procedures set out in the FEPA requiring "for cause" decisions at every stage of the proceeding. *See supra* at 32.

employees who pursue their claims diligently may lose to employers who are guilty of the most blatant discriminatory practices. Moreover, the scheduling of the fact finding conference is wholly within the control of the Commission. As argued above, claimants are not even notified that a fact finding conference must be convened within 120 days of the filing of the charge. *See supra* at 13. In *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972), the Court, speaking through Justice Powell, identified as a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." There it was unjust and irrational to penalize certain illegitimate children for the "irresponsible liaisons" of their parents by denying them equal rights to make claims under Louisiana's workers' compensation laws. *Id.* at 175. Similarly, subjecting a class of charging parties in employment discrimination cases to the consequences of Commission mistakes is an unjust way of resolving employment disputes.

In *Weber,* the Court also decided that penalizing certain illegitimate children was an illogical and ineffectual method of deterring future potential parents from engaging in "irresponsible liaisons." *Id.* In the same way, penalizing diligent claimants for the scheduling mistakes of the Commission's investigators is an illogical and ineffectual method of insuring more expeditious treatment of future charges of employment discrimination. In order to promote that result, the consequences of the failure to schedule fact finding conferences on time would have to fall on the body charged with scheduling them — the Commission.

Furthermore, with respect to pending charges, the harsh application of the 120 day deadline does not act as an effective means of reducing processing time. The reason is that the legislation contains no time limits by which the Commission must ultimately dispose of the case. *See* Ill. Rev. Stat. ch. 48, §§858-859 (1979). As long as the Commission holds the fact finding conference within 120 days and issues a complaint within 180 days, it can take years before issuing its final order and decision.

Unlike a statute of limitations, the Illinois Supreme Court's application of the 120 day deadline does not serve to protect defendants from stale claims. The 120 day limit does not even come into operation unless a charging party has met the 180 day limitations period for filing his charge. The respondent is aware of the charge from the time of filing. In fact, in the instant case, the charge was filed just five days after the discriminatory conduct took place; 180 days had not yet elapsed when the Illinois Supreme Court issued its writ of prohibition and the charge was terminated. Seeking to preserve his remedy, Mr. Logan filed a second charge which stated the same facts. Despite the timeliness of the second charge, the Illinois Supreme Court barred the Commission from proceeding on it. The court said that to proceed "would frustrate the design of the law." *Zimmerman Brush* (J.A. 36).[14]

Even if the Illinois Supreme Court's application of the 120 day rule did serve the purpose of expeditious (if unjust) resolution of disputes, it would still violate equal protection, because it would accomplish the purpose in a patently arbitrary and irrational way. *See United States Railroad Retirement Board* v. *Fritz,* 101 S.Ct. 453, 460 (1980) ("The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way.").

This Court has found that it is irrational and arbitrary to single out a class, irrespective of the conduct of its members or the nature of their claims, and bar it from asserting claims simply to ease the government's burden of enforcing legal rights. In *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court applied the rational relation standard to strike down a legislative classification by which men who applied for appointment as

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[14] The Illinois Supreme Court's application of the 120 day rule is also unlike a statute of limitations in that it terminates charges that have already been filed. Termination of such charges does not extinguish the mere ability to make a claim, but instead interferes with rights that persons have in claims that they have already made.

administrators were given preference over similarly situated women, without any determination on the merits of their respective applications. The legislative goal was said to be the reduction of probate courts' workloads. While the Court noted that this goal may be legitimate, it nevertheless ruled that elimination of a category of persons who are seeking a decision on their applications is not a rational means to accomplish it:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . .

Id. at 76. It is similarly arbitrary and similarly inconsistent with the command of the Equal Protection Clause to terminate charges on the basis of the haphazard failure to schedule timely fact finding conferences "merely to accomplish the elimination of hearings on the merits," and any resulting decrease in the backlog. *See Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972) ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest . . . . But the Constitution recognizes higher values than speed and efficiency."); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. at 175 ("[L]egal burdens should bear some relationship to individual responsibility or wrongdoing.").

Moreover, in the present context, speed is at best a secondary purpose in a larger scheme whose overriding purpose is the eradication of employment discrimination. In *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974), this Court ruled that it violated the rational relation standard to establish a "blanket and conclusive exclusion" for the claims for social security

survivors' benefits of one subcategory of illegitimate children, simply to accomplish the secondary goal of reducing spurious claims:

> [I]t would not serve the purposes of the Act to conclusively deny them an opportunity to establish . . . their right to insurance benefits, and it would discriminate between two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.

Id. at 636.

This Court reached a result similar to that in *Jimenez* in *Trimble* v. *Gordon*, 430 U.S. 762 (1977). The Court held unconstitutional the Illinois statute on intestate succession, which as interpreted by the Illinois Supreme Court, foreclosed the claims of illegitimate children against the estates of their fathers. The Court acknowledged that the classification of claimants did accomplish the purpose of "establishing a method of property disposition," *id.* at 770, but stated that the classification accomplished this minimal objective at the cost of denying the children the capacity to inherit. The Court noted that the same minimal objective could be accomplished as easily with a fairer rule. *Id.* at 771. In the instant case, it is not rational to achieve any minor advantage in speed and efficiency at the cost of denying the rights of charging parties and frustrating the goal of remedying discrimination. Moreover, the state could do considerably more to promote speed and efficiency simply by screening the charges when they are filed and dismissing the weak ones after a preliminary investigation.

This Court has ruled on numerous occasions that it violates equal protection for the state to capriciously or arbitrarily deny a class of persons the right to make valuable legal claims and defenses. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), this Court noted that a state need not provide appellate review to civil litigants, but stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily

> denied to others without violating the Equal Protection Clause.

Id. at 77. In striking down the double-bond requirement in the Oregon forcible entry and detainer statute ("FED"), a unanimous Court found that it was an "arbitrary and irrational" discrimination against the class of FED appellants because it was a "substantial barrier to appeal faced by no other civil litigant." *Id.* at 79. *James* v. *Strange,* 407 U.S. 128 (1972), concerned a Kansas statute that provided that debts for using the services of a public defender were not subject to otherwise available statutory exemptions from execution. The Court held that the Equal Protection Clause required that these defenses could not be arbitrarily withheld from the affected class of debtors. *Id.* at 141. In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Court observed that exclusion of unwed fathers from the group of persons who could assert parental rights in court denied them a procedural right that others could claim. The Court concluded that the law was "inescapably contrary to the Equal Protection Clause." *Id.* at 658. In the instant case, the Illinois Supreme Court has applied the statutory time limit for fact finding conferences in such a way that the class of persons to which Mr. Logan belongs is absolutely prevented from asserting a legal claim that would otherwise be available. The classification of those who can pursue their claims and those who lose them depends on the arbitrary criterion of whether an investigator, prior to any opportunity to evaluate the facts, schedules a fact finding conference on time. The classification does not depend on the merits of the cases of the class members or the diligence the members have exercised. This classification is irrational and should be found to violate equal protection.

CONCLUSION

For the foregoing reasons, appellant Laverne Logan submits that the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

/s/

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APPENDIX

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Rules And Regulations Of The Fair Employment Practices Commission (1979)

Section 4.5. *Dismissal After Investigation* — If after investigation of a charge, the investigative findings indicate that the charge is not supported by substantial evidence or that the Commission lacks jurisdiction of the charge, and this indication is concurred in by the Commission's Executive Director or his designee, the Executive Director shall thereupon cause to be served upon the complainant a Notice of Dismissal. The Notice of Dismissal shall advise the complainant that the charge is recommended for dismissal, and shall state the ground upon which it is to be dismissed, and shall be accompanied by a copy of the written investigation report. The Notice shall further advise that the complainant may object to dismissal of the charge and obtain consideration of the matter by the full Commission, by serving a demand therefor upon the Commission within thirty (30) days of the date of the Notice. If no such timely demand is served by the complainant upon the Commission, the charge shall be deemed dismissed as of the expiration of said thirty-day period, and the parties shall be so notified. In the event the complainant files a timely demand for reconsideration as herein provided, the matter shall be reevaluated by the Commission's staff and submitted to the full Commission for determination. A complainant's timely demand for reconsideration under this Section may be accompanied by such statement and/or evidence as the complainant may feel supports the charge.

Section 4.7. *Commission Finding* — After investigation, the Commission's staff shall submit to the Commission each charge which the investigation indicates is supported by substantial evidence, or in which a complainant has filed a timely demand for reconsideration of a Notice of Dismissal as provided in Section 4.5 of these Rules and Regulations. If the Commission finds that it has jurisdiction of the charge and that there is substantial evidence to support the charge, it shall order that conciliation be attempted in accordance with

Article V of these Rules and Regulations. Otherwise, it may return the charge for further investigation, or order that the charge be dismissed. No charge shall be dismissed by the Commission under this Section unless the complainant has been afforded an opportunity to request reconsideration as provided in Section 4.5 of these Rules and Regulations.

Where the same or substantially identical charge has been filed with the U.S. Equal Employment Opportunity Commission, pursuant to 42 U.S.C. sec. 2000e *et seq.*, the Commission shall grant substantial weight to any findings reached by that agency in making its determination hereunder. In the event that a charge is ordered to conciliation or ordered dismissed, the Commission shall promptly serve notice of such action upon all parties.

Section 5.7. *Failure of Conciliation* — If conciliation fails to effect a settlement or dismissal of a charge as provided in this Article, the Commission shall issue against the respondent and cause to be served upon all parties a written complaint and notice of public hearing, in accordance with Article X of these Rules and Regulations.